

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

TRI-CORP HOUSING, INC.,)	
)	
Plaintiff,)	Case No. CV 12-216
)	Milwaukee, Wisconsin
vs.)	
)	July 15, 2013
ROBERT BAUMAN, ALDERMAN,)	9:06 a.m.
)	
Defendant.)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE CHARLES N. CLEVERT, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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TRANSCRIPT OF PROCEEDINGS

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THE CLERK: This is Tri-Corp Housing, Inc. vs. Robert Bauman, Case No. 12-C-216, here for a motion hearing. May I have the appearances, please?

MR. MACHULAK: Your Honor, John Machulak appearing on behalf of Tri-Corp Housing, Inc. Also with me is Michael S. Brever who is the executive director of the organization. Good morning.

THE COURT: Good morning to both of you.

MR. SMOKOWICZ: Assistant city attorney Jan Smokowicz on behalf of the defendant Robert Bauman. Good morning, Your Honor.

THE COURT: Good morning, Mr. Smokowicz.

Mr. Smokowicz, this is your motion, but before we get into any particulars I'd like to inquire whether there has been any change in the status of this case or any issues that may have been raised with respect to the motion.

MR. SMOKOWICZ: None from our perspective, Your Honor.

THE COURT: Mr. Machulak?

MR. MACHULAK: Not that I know of, Your Honor.

THE COURT: Very well, Mr. Smokowicz. You may proceed.

MR. SMOKOWICZ: Your Honor, I think the arguments have

1 been well set forth in both sides' briefs. I do want to point
2 out a couple of things because I didn't have the opportunity to
3 file a responsive brief. But if the Court wishes, and I'm sure
4 the Court set this matter for hearing because it has certain
5 questions. I'd be happy to --

6 THE COURT: Indeed.

7 MR. SMOKOWICZ: -- address any of those if you'd
8 rather just cut to the chase and pepper me with the questions,
9 so to speak.

10 THE COURT: Well, my first inquiry is a general one,
11 that is: why do you believe that the witnesses' testimony is
12 unsupported and incapable of being received as expert or lay
13 testimony?

14 MR. SMOKOWICZ: Well, perhaps I should take the lay
15 testimony part of it first, Your Honor. And even as
16 Mr. Machulak -- and it may -- it may benefit from relying -- or
17 citing to, I should say -- a large portion of his response, but
18 in essence I don't think he has the sufficient personal
19 involvement and I don't think that this is the kind of situation
20 where the rule envisioned testimony from, especially as a
21 layperson, as an owner of an ongoing profitable business.

22 For example, if you look at Mr. Machulak's citation at
23 Page 7 of his brief, he quotes from *Von der Ruhr vs. Immtech*,
24 and it says there, in part, on Page 7, quote:

25 "For example, the owner of an established business

1 with a documented history of profits," close quote, may testify
2 about continued profits or that sort of thing.

3 Well, the problem here with respect to profits is that
4 there weren't any. We've indicated and established in the
5 submission that we made initially that this was a very
6 unprofitable venture for a number of years before any kind of
7 alleged interference or in this case we were also talking about
8 allegedly unlawful action by Alderman Bauman under federal law.

9 Also on that same page there's a citation and I think
10 it's to one of the cases that we cited, the company, or *Titan*
11 case where there's reference to an owner of a small business,
12 and that's also at Page 7. And there again we don't have an
13 owner of a business, we have an executive director who is akin
14 to a manager of a business. And as a result of that what we
15 don't have is a person who is responsible ultimately for valuing
16 the business and valuing the property in particular, because
17 there's no indication of Mr. Brever making those kinds of
18 judgments, those kind of evaluations – what's the property
19 worth, how much should we pay for the property. In fact, that's
20 absent from their submissions, Your Honor.

21 If you look at their submission carefully, Mr. Brever
22 is not indicated to be the person who made the judgment about
23 exactly how much they should pay for the property because he
24 didn't make the judgment as to how much the property was worth
25 or not worth even at the time of purchase much less years later

1 when this property fell into difficulty. And it may very well
2 be with a nonprofit like this one of two things happen: Either
3 they acquire the requisite expertise from a real estate broker,
4 real estate person who is a buyer's broker, for example; or they
5 may have obtained the expertise from someone outside the
6 business; or he may have relied upon the comptroller who is
7 referred to in the submission; or he may have relied upon the
8 expertise of the board members.

9 And I don't have evidence of this one way or the
10 other, but my own personal experience of sitting on nonprofit
11 boards -- and Mr. Machulak sits on the Tri-Corp board. He's an
12 attorney. He's well versed in business matters. They may have
13 relied upon that expertise in valuing -- in making a valuation
14 judgment about the property itself. And that's --

15 THE COURT: Well, it would appear that the plaintiff
16 is looking to the fact that Mr. Brever was intimately involved
17 in the daily operations of Tri-Corp and has a long history with
18 the entity. Why isn't that sufficient?

19 MR. SMOKOWICZ: Because again, Your Honor, I think the
20 case law that both sides rely upon here need -- or demand more
21 than just intimate knowledge or involvement in some sense.

22 I mean, for example, if you look at Mr. Brever's own
23 affidavit, and I'll just pick out an example here at Paragraph 8
24 on Page 3 of his affidavit, he says he oversaw the acquisition
25 of the New Samaria building, for example. And he obtained

1 appraisals and evaluations of the buildings and secured the
2 financing.

3 Well, he's not making the judgments there. He's not
4 saying under oath that he made any of those judgments or that he
5 reached any of those opinions or conclusions. He may have
6 obtained them, he may have personal involvement in the sense of
7 having seen them, but he doesn't have -- he didn't have the
8 mechanical operation, the mechanical functioning of making the
9 judgment itself.

10 And it's particularly troubling here if you look, for
11 example, at his analysis in his affidavit here where he comes up
12 with a range of a million and a half dollars for this property,
13 up to \$15 million for this property.

14 If I were going to buy or sell that building, which
15 it's gone now, the city took it for its -- for the -- nobody
16 took it, nobody else wanted it. We didn't take it for the value
17 of the mortgage. We didn't pay off the mortgage and take the
18 property. Nobody took that building except the City of
19 Milwaukee for a small sum of money for -- I'm not sure if the
20 Court is familiar with this, but in the city of Milwaukee there
21 are a lot of city services that are billed to both for-profits
22 and non-for-profits as part of the water bill. And the water
23 bill was unpaid for several years to this building. And we took
24 it -- the City of Milwaukee took it for the value of the water
25 bill basically, and the city services. And the building was not

1 sold by the city, it was not rehabilitated by the city. The
2 city demolished the building because it really did not have
3 substantial value as an ongoing building. It was originally, as
4 I understood it, constructed as a rooming house which
5 historically had value in the city of Milwaukee for various
6 things including -- including things like individuals who were
7 working at nearby factories who may not have an apartment, may
8 not want to pay for an apartment, may not have been married and
9 the like. But historically rooming houses are not particularly
10 common or profitable in the city of Milwaukee to my knowledge
11 anymore.

12 In any event, that kind of range, 1 1/2 million to
13 15 million, what is this building really worth? I mean, how can
14 you say that this person has concrete lay or expert knowledge
15 about the value of the building with such a huge range of value.

16 If I were going to buy the building, getting back to
17 my initial point, if I were going to buy or sell the building
18 how would I know in a negotiation with Mr. Brever what he thinks
19 the building's worth? I mean, this is kind of like saying I
20 work every day with the cars in the automobile lot at the car
21 dealership. I may work with them every day, but I'm not the
22 person who makes the judgment about what to buy or sell the car
23 for.

24 And that's the problem here. There are other people
25 who may have had much more knowledge about that kind of thing,

1 but they're not named. Comptroller is not named. She
2 apparently I assume had an accounting degree. Members of the
3 board who may have negotiated the deal for the building or some
4 real estate broker who may have been involved with the deal -- or
5 even New Samaria, they're not named. And we're kind of adrift
6 here.

7 THE COURT: All right. Mr. Machulak, I'd like to hear
8 your response. And, first of all, would you please focus on
9 Mr. Brever's credentials that you are relying upon as a basis
10 for offering him as a lay or expert who can give testimony
11 respecting the value and damages.

12 MR. MACHULAK: Thank you, Your Honor.

13 Your Honor, Mr. Brever has been with the organization
14 since 1981 -- first as a Vista worker, then in 1982 as an
15 employee, then in 1998, when Tri-Corp was formed by merger with
16 the other organization, the chief executive director of all
17 three. There is nobody in the organization that has more
18 knowledge than Mr. Brever about the finances, the intimate
19 details of how the organization works.

20 Tri-Corp throughout the years -- manager is -- is one
21 layer of his activity, but spearhead is another. I mean, the
22 organization has a volunteer board of people who are in various
23 walks of life that come to a board meeting once a month to find
24 out what Mr. Brever has done or put before him in the
25 organization. The board members don't go out and search out a

1 New Samaria, a West Samaria, they --

2 THE COURT: But what gives him the ability to offer
3 testimony respecting value? Yes, he has a history. History is
4 history, but the particulars of the history are what's key to
5 one's ability to offer testimony concerning value.

6 MR. MACHULAK: Well, Your Honor, I think value is one
7 part of -- one part of damages. I mean, the real question --

8 THE COURT: But what credentials does he possess that
9 gives him the ability to offer particular testimony regarding
10 value? I know the history. That's pretty clear he's had a long
11 history with the entity, but where's the beef?

12 MR. MACHULAK: Okay. He's bought and sold in his
13 capacity hundreds of properties for the organizations over the
14 years. He has gone in and proven up the value to lenders to --

15 THE COURT: Tell me -- give me some particulars
16 regarding value.

17 MR. MACHULAK: With --

18 THE COURT: I -- like everybody else, I've bought
19 cars, but I'm not a mechanic.

20 MR. MACHULAK: Well, in the case of New Samaria and in
21 the Samarias where you're providing housing for mentally
22 disabled people he has gone and negotiated -- looked at --
23 searched out a number of places, alighted upon New Samaria not
24 far from the -- from the events that we're talking about here,
25 negotiated --

1 THE COURT: What about the value of these properties?
2 What gives him --

3 MR. MACHULAK: He has --

4 THE COURT: -- special insight into valuation of this
5 particular entity or other entities of this type?

6 MR. MACHULAK: His involvement in negotiating purchase
7 price and establishing entities --

8 THE COURT: Give me some particulars, please.

9 MR. MACHULAK: For New Samaria which was, you know,
10 part of the whole picture here, Mr. Brever located -- after
11 searching through a number of sites located a nursing home that
12 was suitable. Now, the value added to any location is working
13 with the municipality to make sure that you go into the place
14 and it will be -- the municipality will go along with your
15 intended use of it. That involved considerable time, effort,
16 investment on the part of the time of the organization.

17 So when you look at a property like this and you're
18 talking about like West Samaria like Mr. Smokowicz is talking
19 about, yeah, maybe to -- to a nonprofit involved in providing
20 places for rooms for mentally handicapped people, knowing what
21 the facility -- knowing that this facility is suitable -- is
22 historically suitable gives it its special value versus to
23 somebody who is just saying I want to buy an apartment complex.

24 THE COURT: Yes, but how does he go about setting a
25 value?

1 MR. MACHULAK: Well, in his analysis that I gave you
2 we know that the New Samaria was done at arm's length. Because
3 that was a purchase, there was investment in it to make it --

4 THE COURT: Well, you tell me what was done because I
5 don't know.

6 MR. MACHULAK: Okay. When the New Samaria was
7 acquired, which is not long in the past to the events here,
8 there had to be a nursing home -- it was a nursing home that was
9 up for sale. What had to be done is it had to be modified, it
10 had to be approved for use as a facility for an added investment
11 for -- a facility for people who has a -- had little handicaps.
12 That's all invested money on top of the structure. When you
13 look at what it cost to put that structure together it does give
14 an excellent comparable to West Samaria, the other one.

15 THE COURT: Well, that doesn't tell me about
16 Mr. Brever's ability to testify.

17 MR. MACHULAK: Well, Your Honor, his --

18 THE COURT: Do you wish to have him take the stand to
19 provide some specifics that perhaps will give us some insight
20 into his competence?

21 MR. MACHULAK: That will be fine, Your Honor.

22 THE COURT: Mr. Brever?

23 THE CLERK: Do you solemnly swear or affirm under the
24 penalty of perjury to tell the truth, the whole truth and
25 nothing but the truth?

1 THE WITNESS: I do.

2 THE CLERK: State your name and spell your first name
3 for the record.

4 THE WITNESS: My name is Michael Brever. The last
5 name is B-R-E-V-E-R.

6 THE COURT: Mr. Machulak, do you wish to ask questions
7 of the witness or do you wish to just tender him? Do you wish
8 to just tender him for examination or are you going to ask
9 questions of him?

10 MR. MACHULAK: Whatever the Court prefers. I mean, I
11 could ask him some background questions. That would I think be
12 helpful.

13 THE COURT: Proceed. Proceed.

14 MICHAEL BREVER, PLAINTIFF WITNESS, DULY SWORN

15 DIRECT EXAMINATION

16 BY MR. MACHULAK:

17 Q. Mr. Brever, you are the executive director of the plaintiff
18 Tri-Corp Inc., yes?

19 A. Correct.

20 Q. And how long have you been executive director?

21 A. Since the organization's founding in 1998.

22 Q. Okay. And currently you have, because of the status of
23 Tri-Corp, you have other full-time employment, correct?

24 A. That is correct.

25 Q. What is your full-time employment at present?

1 A. I'm the development manager at Milwaukee Public Television.

2 Q. And before you became involved in Tri-Corp what was your
3 educational background?

4 A. I had an undergraduate degree from UWM, a bachelor of arts.
5 I had a Master's Degree in Management from Cardinal Stritch
6 University.

7 Q. Okay. And when you began to -- let me just cut to the chase
8 on some of the judge's questions here. You were involved in the
9 acquisition of -- of New Samaria, were you not?

10 A. I was.

11 Q. Could you just briefly explain to the Judge what that
12 process involved.

13 A. First of all, it began with a directive from the board to
14 create a better housing environment for the people that were
15 living with us. A decision was made by our board of directors
16 that East Samaria was no longer adequate to serve the needs of
17 the disabled individuals under our care. And so I commenced a
18 search for a new facility, understanding the special needs of
19 our unique clientele and the services that were required to
20 prepare and provide for them adequately.

21 I did, in fact, use the services of a real estate
22 broker. I had used a young lady by the name of Kathy Merkle
23 from RE/MAX Realty. And she went out and identified several
24 potential properties. I think over a period of months I
25 probably was in and out of 10 or 15 different facilities that

1 potentially would have met our needs.

2 The particular property that became New Samaria on
3 67th and Beloit at that time was owned by a gentleman by the
4 name of Larry Rice who managed Title 19 nursing homes. It had
5 actually been a convent prior to his acquisition of it, as well
6 as a medical care facility.

7 I had, first of all, determined that the zoning was
8 potentially going to be an issue given the fact that it was a
9 medical care facility and we function as a room-and-board. And
10 as a result of that I had to petition the City of West Allis to
11 grant us a variance, so to speak. I'm not certain specifically
12 what West Allis calls it. Milwaukee would call it a variance of
13 the zoning code to accommodate our needs. That was a lengthy
14 and a legal process. I headed the organization's efforts in
15 that regard. I did, in fact, retain legal counsel to assist us
16 in that as well, but I was the spokesperson for the organization
17 and the strategist, if you will, as we proceeded with that.

18 I also had to work with our lender, the Wisconsin
19 Housing and Economic Development Authority, who had a blanket
20 mortgage across two parcels. What was then called East Samaria
21 and what this court nows knows as West Samaria. I had to work
22 with the Wisconsin Housing and Economic Development Authority to
23 break apart that financing because New Samaria in West Allis was
24 going to require specific financing as well.

25 It was WHEDA's choice to enter into a blanket mortgage

1 again with us. I had to negotiate that process and the
2 particulars of that particular deal with WHEDA. In the process
3 of that I had to ensure that valuations were there. WHEDA
4 mandated that we would not exceed a 1.15 debt coverage ratio,
5 which is an analysis of the revenue of the building to the
6 expenses of the building. In essence you couldn't accrue more
7 than 15 percent discretionary cash over and above mandatory
8 expenses of the building. And I had to demonstrate based on the
9 potential rent revenue for the building and what the expenses
10 would be that we would fall under those guidelines.

11 There was a purchase price that needed to be
12 negotiated. Once all of that had been done to ensure that the
13 loan that we would take on would meet the parameters of the
14 WHEDA guidelines, and once that had been facilitated we
15 proceeded to closing.

16 In many ways, although it has no bearing on this
17 particular case, the hardest part of it all was shutting down a
18 facility that served 86 chronically mentally ill and relocating
19 them to a facility that served 75. We had to create a degree of
20 attrition so that we would not have too many residents at the
21 time of the move. There were movers that had to be acquired.
22 Most of the residents that we dealt with had no families and so
23 we had to serve as their advocates and guardians as the move
24 transpired.

25 And in a nutshell that's what I did to facilitate the

1 closing of this particular property.

2 Q. Now, Mr. Brever, are you able to translate your experience
3 with New Samaria to the West Samaria in terms of what the value
4 of a facility that can serve people in this population is?

5 A. Actually, given the fact that our residents lived under a
6 fixed income which ranged anywhere from \$650 a month to \$925 a
7 month, depending upon what the guidelines of the SSI program
8 determined was appropriate for them, the income that came to our
9 residents, our inability to charge rent was very static between
10 the two facilities.

11 It was very much a similar model from one building to
12 the next. We provided 24-hour staffing at both facilities. We
13 provided three meals a day at both facilities. We worked with
14 our residents to ensure that some type of case management was in
15 place for all of them. Given the fact that we were under one
16 blanket mortgage, the expenses to both buildings were relatively
17 similar given the fact that the greatest monthly expense is, in
18 fact, the mortgage that we had to pay on the two campuses.

19 So the models both in terms of a practice functioning
20 and provision of services, plus in terms of finances, was very,
21 very similar.

22 THE COURT: Go ahead.

23 BY MR. MACHULAK:

24 Q. Are you -- when you -- before -- what I want to say the
25 events of this case, I mean, was there a problem with occupancy

1 with New Samaria and West Samaria?

2 MR. SMOKOWICZ: I'm going to object to the form of the
3 question as vague.

4 THE COURT: Rephrase.

5 MR. MACHULAK: Okay.

6 BY MR. MACHULAK:

7 Q. Can you tell the Judge the history of the occupancy of the
8 New and West Samaria?

9 A. At West Samaria in particular?

10 Q. Yes.

11 A. At West Samaria occupancy was extremely high prior to the
12 events that led to this hearing. We were typically well in
13 excess of 90 percent, most times at 95 percent. Vacancies were
14 transitional in nature and typically during the duration of the
15 repair to a unit.

16 Approximately a third of the facility was rented at
17 all times by the Red Cross for a specific program that they
18 managed called Autumn West. So those were guaranteed
19 occupancies during our management of the facility.

20 There also is an issue in the city of Milwaukee, and
21 in Milwaukee County as well, that there is a tremendous shortage
22 of units available to residents of this particular kind. And
23 not only did we have a historically high occupancy that was only
24 affected by transitional -- someone moving out and it takes a
25 month or two to move someone in, but typically there was a

1 waiting list of people to move in.

2 Now, in our particular case it wouldn't typically be a
3 John or a Jane Doe that was on a waiting list. What it was was
4 a caseworker for Milwaukee County or one of Milwaukee County's
5 sub-grantees who would say to us, "I have a client who needs a
6 room, when will you have a vacancy for me?"

7 So in essence the relationship commenced with outreach
8 from a caseworker and not necessarily the resident that lived in
9 our unit.

10 Q. In your affidavit you mentioned that in 2003, \$400,000 was
11 just put into West Samaria, the building that Mr. Smokowicz was
12 talking about. Can you explain to the Judge how that happened?

13 A. We had done a needs assessment in 1999, shortly after
14 Tri-Corp came into being. The new management wanted to get a
15 feel for our capital needs, the state of our infrastructure, and
16 as a result of that we actually had an architect on our staff at
17 that time who performed a capital needs assessment and it was
18 determined that the bathrooms in particular were wholly
19 inadequate for the needs of our clients. It was also determined
20 that the method of entry into the building was rather antiquated
21 given the fact that this was an extremely vulnerable population
22 and we needed to have a secure entrance, a buzz-in system if you
23 will, and pricing was done to determine what the cost of these
24 improvements would be. A new flooring in rooms, complete
25 gutting and renovation of all the bathrooms, a new entryway,

1 et cetera.

2 And once the original budget was construed a
3 fund-raising campaign commenced. We were very successful
4 through two specific grant sources. The Jane Petit Bradley
5 Foundation was very generous to us, as well as the Federal Home
6 Loan Bank out of Chicago was very generous to us. There was
7 some small grants as well, but those two sources comprised the
8 bulk of the \$400,000.

9 Over a period of 12 months the bathrooms were, in
10 fact, gutted and completely renovated, making them completely
11 ADA compliant and cleanable. Part of the issue was that there
12 were wood surfaces throughout the former bathrooms and we went
13 through a process which created a poured concrete floor with a
14 textured surface, Formica tops throughout and things like that.
15 We upgraded the plumbing so that we could have the high force
16 systems installed. And over a period of 12 to 18 months we
17 facilitated the renovation.

18 Q. And in Mr. Smokowicz' position with the judge he mentioned
19 the fact that you can -- you could look at the value of West
20 Samaria with a fairly wide range from a million and a half to
21 something substantially higher than that. Can you explain to
22 the Judge what your basis is for that?

23 MR. SMOKOWICZ: I'm going to object to the form of the
24 question. I didn't look at it that way. That's just a
25 reference to what Mr. Brever has submitted in a brief --

1 THE COURT: Rephrase, please.

2 MR. MACHULAK: I'll rephrase.

3 BY MR. MACHULAK:

4 Q. Can you explain to the Judge why there would be considerable
5 range -- or there could be a considerable range in value for a
6 housing unit for somebody with mental disabilities?

7 A. I think specifically it's that this isn't a traditional
8 rental facility. This is a facility that provides for a special
9 needs population that incorporates a care component and, as a
10 result of that, doing a formulation based specifically on a rent
11 analysis doesn't do justice to what we try to determine as a
12 valuation.

13 We do know that based on the closing that transpired
14 in 2003 and the appraisals that were done of New Samaria, that
15 there was approximately a \$16,000 per-unit valuation placed on
16 the units of New Samaria. And that gets to the low end for the
17 valuation on West Samaria. West Samaria in and of itself was
18 tax exempt in the city of Milwaukee, and so there is no
19 valuation from the city tax assessor to go by.

20 So I looked at it as a unit basis. What was the
21 assumption in determining a mortgageable value, if you will, at
22 New Samaria. Once again the service model was extremely
23 similar, the services we provided were virtually identical, and
24 as a result a per-unit basis seemed an appropriate valuation.

25 The other valuations that I did were based on, in

1 fact, the rent potential over a period of time. Looking at the
2 cost to replace with a new facility. The City of Milwaukee and
3 Milwaukee County readily admitted that there is a shortage of
4 units even today for this particular special needs population,
5 and so there is new construction happening quite frequently
6 typically using Section 42 tax credits and home funds or block
7 grant dollars as a blend. Those units are costing as much as
8 \$160,000 per unit to build because of the unique amenities
9 required to ensure that the -- the building is adequate to meet
10 the needs of the clientele, to ensure that it is acceptable to
11 city standards and a service model standard for Milwaukee
12 County, and that got me to the high end of the valuation.

13 Q. Okay. And the -- and that was comparing what other projects
14 that serve the same type of population would cost?

15 A. At the time I looked at this there were actually several
16 projects that were under construction that, according to
17 articles in the Milwaukee Journal, were costing approximately
18 \$160,000 a unit to build.

19 Q. Okay.

20 Your Honor, I guess my question, do you want him to
21 talk about other damages? I know I would be asking him to
22 testify as to reputational damage, for example.

23 THE COURT: (No audible response.)

24 MR. MACHULAK: Okay.

25 BY MR. MACHULAK:

1 Q. Mr. Brever, in preparing for your testimony and your
2 affidavit to try to get our arms around how to prove
3 reputational damage to Tri-Corp as a result of this incident,
4 could you explain to the Judge how we calculate reputational
5 damage?

6 MR. SMOKOWICZ: I'm going to object to the form of the
7 question. We?

8 MR. MACHULAK: Yes.

9 BY MR. MACHULAK:

10 Q. Well, you calculate -- that we, Tri-Corp, calculates its
11 reputational damage.

12 MR. SMOKOWICZ: Your Honor, I just want to make sure
13 here we're talking about who is making this calculation.

14 MR. MACHULAK: Mr. Brever on behalf --

15 THE COURT: Rephrase.

16 BY MR. MACHULAK:

17 Q. Mr. Brever, could you explain how you calculate reputational
18 damage sustained by Tri-Corp.

19 A. Prior to the events that we're discussing today, Tri-Corp
20 was actually seen as the largest and most successful nonprofit
21 housing producer in the city of Milwaukee. We had had a 20-year
22 relationship with the Block Grant Program of the City of
23 Milwaukee, and for many years we had been viewed as the largest
24 and the most successful provider of that housing. We were
25 receiving grants in excess of a million dollars through the

1 block grant and the Home Funds Program of the City of Milwaukee.
2 That was approximately two-thirds of an annual base of support
3 that we received from grant revenue of approximately 1.5 to
4 \$1.6 million.

5 In the world of nonprofits there really are somewhat
6 of a different way of calculating damages to a nonprofit. You
7 can take the financial losses of today and count that as the
8 loss. The real loss to a nonprofit, however, is its loss
9 towards credibility and its reputation.

10 Its credibility and its reputation is its gateway to
11 future income, future program services, future opportunities to
12 work with the community on new opportunities. Arguably at the
13 time of these events, Tri-Corp was seen as one of the best in
14 the city of Milwaukee and by the end of these events it was
15 discredited and in a state of disarray. Our grants had gone
16 from an annual of approximately 1.5, down to about \$25,000. Our
17 ability to continue to provide services which were dependent
18 upon those grants became extinct. We weren't able to function
19 under those parameters.

20 Arguably if a nonprofit has a difficult program and is
21 seen as not succeeding at it, it might affect its potential to
22 conduct business today. But as long as it has a good reputation
23 and credibility and an ability to move forward, it has an
24 ability to rebound. And that was taken away from Tri-Corp.
25 There was no ability to come back and provide new partnerships

1 and new programs and new services to the community that we
2 strove to serve.

3 Q. And are you able to put a dollar amount on the reputational
4 damage?

5 A. You know, at the time of these events Tri-Corp was working
6 with WHEDA, assisting a pure nonprofit that was in a complete
7 state of disarray. We were downsizing their portfolio to a
8 manageable amount, infusing new management practices for them.
9 We had several Section 42 low-income housing tax credit projects
10 in our portfolio. We were managing upwards of 850 units of
11 housing, approximately 600 of which were under our ownership.
12 We had a \$20 million balance sheet at that time, we had an
13 annual budget of approximately \$6 million, and all of that was
14 gone by the time that these events played themselves out.

15 So that's what I look at as a potential valuation for
16 the corporation.

17 Q. Going back to the more specific damages that were sustained
18 by the organization in 2007, when basically the decision was
19 made to empty out West Samaria, -- not -- by others -- can you
20 explain to the Judge what economically, how that economically
21 impacted -- how the emptying out of West Samaria impacted the
22 rest of the organization?

23 A. Given the fact that West and New Samaria were under one
24 mortgage we couldn't just walk away and abandon West Samaria
25 because New Samaria would have closed as well. What that would

1 have entailed was putting approximately 160 individuals who
2 suffered from chronic mental illness into an extremely
3 vulnerable state, potentially homelessness. At that time there
4 was a dearth of available units in the city and county of
5 Milwaukee that would even accept individuals who had these
6 special needs. And so we felt an obligation to maintain the
7 housing as long as possible.

8 As I've explained, when we initially took the loans
9 out with WHEDA they mandated that we have no more than a 1.15
10 debt coverage ratio, which in essence means 15 percent
11 discretionary cash over and above the cost to manage the
12 facilities. That had to pay for every sundry item that we put
13 into the facilities. As a result of that, there was extremely
14 little discretionary cash and high occupancy was the key to a
15 successful model.

16 As that occupancy dwindled we no longer had the
17 ability to sustain our bills and to ensure that we could provide
18 adequately for the needs of our residents. That was exacerbated
19 by the fact that the Red Cross had a program with us which
20 provided housing for 31 individuals at West Samaria and they had
21 no place to move them. I mean, this was not moving one or two
22 residents at a time, this was finding an adequate facility that
23 would take over the housing and the support needs of 31
24 individuals en masse.

25 As a result of that we actually felt an obligation to

1 maintain staffing, the provision of food, security, et cetera
2 almost up to a year after the facility ceased to function
3 financially. I believe it was October of the following year
4 when the Red Cross was finally able to move out. All that while
5 New Samaria was at full occupancy but in financial jeopardy
6 because of the situation of the mortgage.

7 Q. And as far as the facts and figures showing how much was
8 coming in and how much was going out to sustain the building
9 over this period of time, do you have exact figures on this
10 month by month?

11 A. I did submit a chart in my affidavit that did that, but I
12 believe at the end of our analysis it was cumulatively a little
13 bit over \$600,000, and again given the fact that by WHEDA
14 mandate most of that money was used to sustain the building and
15 the service model. I mean, that basically was a shortage in the
16 program.

17 Q. Mr. Brever, is there anybody else at Tri-Corp that had as
18 much oversight knowledge -- I don't want you to pump yourself
19 up -- but as much knowledge of the organizational history as
20 yourself?

21 A. There wouldn't be.

22 Q. And you were -- this is your full-time occupation, your
23 day-to-day involvement from -- for as long as you've been
24 working for Tri-Corp?

25 A. That's correct.

1 MR. MACHULAK: That's all -- that's all I have,
2 Your Honor.

3 THE COURT: Mr. Smokowicz?

4 MR. SMOKOWICZ: I have a few questions, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. SMOKOWICZ:

7 Q. Mr. Breuer, first of all, with respect to your educational
8 background you mentioned that you had a bachelor's degree at
9 UWM, correct?

10 A. That is correct.

11 Q. And your bachelor's degree at UWM is not in accounting,
12 correct?

13 A. That is correct.

14 Q. And your degree -- your post-graduate degree at Cardinal
15 Stritch is in management, correct?

16 A. That is correct.

17 Q. That is also not in accounting, correct?

18 A. Correct.

19 Q. Now, with respect to the purchase of New Samaria, just so
20 that we have a timeframe, you haven't mentioned when it was
21 purchased but my understanding from your affidavit is 2001; is
22 that correct?

23 A. Yes.

24 Q. And the events that we're talking about here in terms of the
25 mortgage foreclosure on West Samaria, that occurred six years

1 later in 2007, correct?

2 A. That is correct.

3 Q. So it's my understanding, in terms of the property
4 valuation, you're attempting to extrapolate the value of the
5 property at West Samaria at least in part on your knowledge
6 based upon events that occurred six years earlier at New
7 Samaria, correct?

8 A. That was one effort, yes.

9 Q. Okay. So let's look at your involvement in New Samaria.
10 First of all, the New Samaria property itself is located, as you
11 mentioned, in West Allis, correct?

12 A. That is correct.

13 Q. At about 66th or 67th and Beloit Road, correct?

14 A. It was, yes.

15 Q. And as opposed to West Samaria that was located where in the
16 city of Milwaukee?

17 A. 2713, I believe, West Richardson.

18 Q. So that's near State Street; is that correct?

19 A. Yes.

20 Q. To around 22nd and State Street?

21 A. 27th and State Street.

22 Q. 27th.

23 A. Yes.

24 Q. Pardon me, I misspoke. 27th and State Street. Now, in
25 reaching your evaluation analysis you haven't compared or

1 contrasted the character of the two buildings, correct?

2 A. I did not.

3 Q. So, for example, it looks like, if I look at your affidavit
4 that was attached to our motion -- or accompanied our motion and
5 your affidavit --

6 THE COURT: Is that Document 12-1?

7 MR. SMOKOWICZ: It's Document 12-1, yes, Your Honor.
8 And I was looking at Exhibit 2 of that in particular.

9 BY MR. SMOKOWICZ:

10 Q. Mr. Breuer, that's an assessor's record from the City of
11 West Allis. Do you recall that affidavit and attaching that
12 assessor's record?

13 A. Yes.

14 Q. You do? Okay. And it refers there to the fact on the
15 second page of that -- so that would be Document 12-1, Page 8 of
16 111 -- it refers to that property having an acreage of 1.117
17 acres of land? Does that sound familiar to you?

18 A. I'd have to refresh my memory but that sounds about right,
19 yes.

20 Q. Okay. You haven't compared that to the size of the acreage
21 for West Samaria over on Richardson Place, have you?

22 A. I did not.

23 Q. And as a matter of fact, one of the criticisms of West
24 Samaria was that there really was no external land area enclosed
25 around the building for the residents to sit outside, for

1 example, outside the building. The building butted up against
2 the sidewalk, didn't it?

3 A. The building was very close to the property line, yes.

4 Q. Yeah, yeah. And so as opposed to New Samaria which had some
5 open land around it, correct?

6 A. It did.

7 Q. Yeah. Okay. And you haven't, of course, looked at any
8 properties around 27th and Richardson Place to attempt to come
9 to some kind of evaluation of the property, correct?

10 A. I did not.

11 Q. And, in fact, you don't know -- do you know whether or not
12 there were similar properties size wise and age wise around that
13 property?

14 A. The only property that I'm aware of is a former nursing
15 home, I believe it was on Highland Boulevard, but I'm not
16 familiar with the valuations on it.

17 Q. And I assume also you're not particularly familiar with the
18 size of the rooms inside that building, correct?

19 A. Now, which building?

20 Q. The one, the former nursing home near Richardson Place.

21 A. The one on Highland Boulevard?

22 Q. Yes.

23 A. Yeah, I'm not familiar with the building.

24 Q. Okay. Now, with respect to New Samaria you say that you did
25 the search for the building, correct?

1 A. That is correct.

2 Q. But you also had the assistance of a real estate broker; is
3 that correct?

4 A. I did.

5 Q. Did the real estate broker provide you with various items of
6 information such as the listing price?

7 A. She did.

8 Q. Did the real estate broker provide you with advice with
9 respect to whether the listing price for New Samaria was within
10 range of the actual value of the property?

11 A. We were aware of the assessment on the property because --

12 THE COURT: One second. Testify to what you know,
13 knew, or what you know. All right? Not what we know.

14 THE WITNESS: Okay.

15 THE COURT: I don't know who "we" would be.

16 THE WITNESS: I understand. I was aware of the
17 assessment for the City of West Allis. I mean, that's just a
18 perfunctory thing that I typically do when I determine whether a
19 property is an appropriate acquisition for us or not. I knew
20 what the purchase price was. I typically did not rely --

21 BY MR. SMOKOWICZ:

22 Q. Just a second. Mr. Breuer, what I asked you was whether she
23 had provided you information about the listing price. She did
24 that, right?

25 A. She did.

1 Q. And did she provide you the information with respect to the
2 assessment or did you obtain that on your own? Or did somebody
3 else give that to you?

4 A. Yeah, I don't recall. I could have looked it up. She may
5 have given it to me. I'm not positive.

6 Q. And with respect to -- with respect to the properties at
7 West Samaria, of course, on Richardson Place, that didn't have
8 an assessment value, correct?

9 A. Correct.

10 Q. Because it's a nonprofit that was not taxed in the city of
11 Milwaukee.

12 A. That is correct.

13 Q. All right. So part of your basis for valuing New Samaria is
14 just what did the city assessor in West Allis think the property
15 was worth; is that fair?

16 A. It was one portion of an analysis, yes.

17 Q. Okay. And did you obtain information from other -- well,
18 strike that.

19 Were you involved in the actual negotiation of the
20 purchase?

21 THE COURT: Of which property?

22 THE WITNESS: Of New Samaria?

23 BY MR. SMOKOWICZ:

24 Q. Of New Samaria, yes.

25 A. Yes, I was.

1 Q. All right. And did you rely upon other individuals to come
2 up with the offer price that you were going to make for that
3 property?

4 A. I used my real estate broker to write the offer.

5 Q. And did your real estate broker make the suggestion as to
6 how much to offer for that property?

7 A. No.

8 Q. Who made the suggestion as to offer how much for that
9 property?

10 A. I formulated that opinion myself.

11 Q. And that was based solely upon the assessment value?

12 A. And our ability to generate the revenue necessary to sustain
13 the building. What I felt WHEDA might be willing to provide as
14 a mortgage on it based on the 1.15 debt. There's a series of
15 analyses that I would put into it.

16 Q. But Mr. Breuer, let me just make clear about this now here
17 something. I understand that you were concerned about how much
18 you can get to finance the property, but we're talking about
19 what's the property worth? And other than the assessment did
20 you have any other source of information to guide you as to what
21 the property was worth?

22 A. There was an eventual appraisal done on the property, but it
23 was after the offer was accepted.

24 Q. And you did not perform the appraisal, correct?

25 A. I did not.

1 Q. And, in fact, the appraisal was performed by the mortgagor,
2 I assume, WHEDA?

3 A. There was an appraisal done on behalf of the mortgagor,
4 correct.

5 Q. And who was that performed by?

6 A. I don't recall who the specific appraiser was. I'm sorry.

7 Q. And you have not produced that in the materials that you
8 have here, correct?

9 MR. MACHULAK: I -- I object to the form --

10 THE COURT: One second. Is there an objection?

11 MR. MACHULAK: Yes. I object to the vagueness of the
12 materials produced because we did have a document --

13 THE COURT: Overruled.

14 MR. MACHULAK: Pardon?

15 THE COURT: Overruled.

16 THE WITNESS: I'm sorry, you're asking did I provide a
17 copy of the appraisal?

18 BY MR. SMOKOWICZ:

19 Q. As part of your affidavits in support of --

20 A. Correct.

21 Q. Let me just -- as a part of your affidavits in support of
22 your opinion about the value of this property did you ever
23 provide the appraisal for New Samaria?

24 A. As part of the affidavit I did not.

25 Q. Okay. As part of the affidavit for your supporting the

1 value of West Samaria, did you ever provide an appraisal from
2 WHEDA for the value of that property?

3 A. I believe there were --

4 Q. In your affidavits.

5 A. In my affidavit I did not. But I believe in the submissions
6 there were.

7 Q. And in terms of those appraisals you did not perform either
8 of those appraisals, correct?

9 A. That is correct.

10 Q. You mentioned also that at some point after -- or at some
11 unidentified time \$300,000 was put into the West Samaria
12 building for renovations, correct?

13 A. I believe it was closer to 400,000.

14 Q. All right. When did that renovation occur?

15 A. We did the capital needs assessment in '99. I believe the
16 renovation occurred in 2001.

17 Q. So again approximately six years before the foreclosure,
18 that was when this work was performed, correct?

19 A. Correct.

20 Q. All right. Once again did you perform any kind of appraisal
21 of the property in order to obtain the grants or the financing
22 for it?

23 A. No.

24 Q. Did anyone else at that time perform an appraisal of the
25 property to determine the overall value of the property West

1 Samaria at Richardson Place at that time?

2 A. In 2001?

3 Q. Whenever you did this renovation work.

4 A. No.

5 Q. Now, you've also made some reference to replacement cost of
6 \$160,000 per unit, correct?

7 A. Based on new standards for new construction, right.

8 Q. Right. And can you tell the Judge just how old the
9 Richardson Place building is or was?

10 A. It was acquired by Housing With Help in '76. I believe it
11 was -- I believe it was constructed 10 to 15 years prior to
12 that.

13 Q. So 1966.

14 A. Somewhere in that area, I believe.

15 Q. Or the early '60s perhaps?

16 A. Possibly.

17 Q. Okay. Now, when you talk about replacement costs you're
18 talking about new construction, correct?

19 A. Yes.

20 Q. Not 50-year-old buildings, correct?

21 A. Correct.

22 Q. When you're talking about replacement costs, by the way,
23 what you're relying on is not something that you did personally,
24 but you're replying upon a report in the Journal Sentinel
25 newspaper, correct?

1 A. Correct.

2 Q. So you did not actually go out there at that time and do any
3 of the calculations for the replacement cost, correct?

4 A. Correct.

5 Q. You also mentioned that in valuing the facility you have to
6 take into account the care component, correct?

7 A. Correct.

8 Q. And when you talk about the care component in terms of this
9 property, West Samaria, included things such as meals, correct?

10 A. Yes.

11 Q. And what else did it include?

12 A. There was 24-hour staffing at the facility. There was
13 access to case management. We had meeting rooms that people
14 could utilize to meet with their caseworkers and things like
15 that. If the caseworker required it or requested it we would
16 arrange transportation to doctor's appointments or things of
17 that nature. So it was a variety of things.

18 Q. Was that all covered by the rents that were charged?

19 A. Yes.

20 Q. So if you looked at the rent that was charged to these
21 individuals which was payable out of their SSI money, we would
22 know what that care component is, correct?

23 A. It was not -- it was not broken out.

24 Q. It was not broken out, but it was covered by it, correct?

25 A. That is correct.

1 Q. Now, you keep referring to the events in your testimony.
2 You're talking about what happened in 2007 in terms of the
3 foreclosure, correct?

4 A. Yes.

5 Q. Again in terms of valuing reputation of the -- or goodwill
6 of the business, of this nonprofit business, Mr. Brever, you are
7 not an accountant, correct?

8 A. That is correct.

9 Q. And this is not something that's -- the item of goodwill,
10 it's not something that's included in any of your financial
11 statements that were produced at any time for WHEDA, for
12 example, correct?

13 A. Correct.

14 Q. And it's not included in the annual statements that are
15 attached, let's say, for example, to your affidavit from the
16 state court case. For example, I'm looking at Page 68 of 93 on
17 Document 12-2. Mr. Brever, it's not part of your annual
18 reports, correct?

19 A. Correct.

20 Q. So you didn't really give us a goodwill number here, did
21 you?

22 A. I'm not sure I understand the question.

23 Q. Well, what is the exact dollar amount of lost goodwill here?
24 To the penny.

25 A. I view it as the ability of the agency's --

1 MR. SMOKOWICZ: Your Honor, I'm going to move to
2 strike the answer as nonresponsive. I want to know the number.

3 THE COURT: It is stricken.

4 THE WITNESS: Could you -- I'm not sure I understand
5 the question.

6 BY MR. SMOKOWICZ:

7 Q. I'll repeat it. What is the exact dollar amount of lost
8 goodwill here that you are claiming, to the penny?

9 MR. MACHULAK: Well, I'll object to the form of the
10 question.

11 THE COURT: Overruled.

12 THE WITNESS: To the penny.

13 BY MR. SMOKOWICZ:

14 Q. What is the exact dollar amount?

15 A. I'm not certain I can give you a specific answer to the
16 penny.

17 Q. What is the exact dollar amount to the dollar, amount of
18 lost goodwill here?

19 A. I would think given the fact that the organization at the
20 time of these occurrences was a thriving \$6 million a year
21 enterprise, I would say \$6 million.

22 Q. So you're saying the gross -- is that gross income?

23 A. Yes.

24 Q. So you're saying that the value of goodwill lost here is the
25 gross income amount of \$6 million before a penny of expenses is

1 applied?

2 A. That was my dollar amount, yes.

3 Q. And your basis for that is?

4 A. The annual revenue stream for the organization.

5 Q. Again, my question is this: What is your basis for choosing
6 that number as the lost goodwill?

7 A. A nonprofit's ability to function in a community is its
8 reputation within that community. Our reputation at that time
9 was sufficient to justify \$6 million a year in revenue to
10 provide the programs that we were providing. That reputation no
11 longer exists.

12 Q. Have you done any academic study to determine that it's
13 proper to value lost goodwill of a nonprofit in that fashion?

14 A. I have not.

15 Q. Have you taken any classes to educate you in that regard?

16 A. I have not.

17 Q. Have you consulted with your attorney in order to come up
18 with that number?

19 A. I haven't, no.

20 Q. And as a matter of fact, have you consulted with your
21 attorney in preparing the affidavits that you have in support of
22 the damages claims here?

23 A. The attorney asked me to consider several questions which I
24 formulated answers to, but that was it. And actually, I don't
25 mean to nitpick here, but I don't have an attorney, Tri-Corp has

1 an attorney.

2 THE COURT: Off the record, please.

3 MR. SMOKOWICZ: Yes.

4 (Proceedings was interrupted at 10:08:04 a.m., until
5 10:41:35 a.m.)

6 THE COURT: Be seated, please.

7 Do you wish to offer any additional testimony?

8 MR. SMOKOWICZ: Your Honor, I had a few more questions
9 for Mr. Breuer.

10 THE COURT: Mr. Breuer.

11 BY MR. SMOKOWICZ:

12 Q. Mr. Breuer, before we had to take the break it's my
13 recollection that you testified that the loss of goodwill amount
14 here is \$6 million, correct?

15 A. That is what I said before, but I'd like to clarify that if
16 I could.

17 Q. Well, let's get a little clarification here.

18 A. Okay.

19 Q. You submitted an affidavit to this court in response to our
20 motion with regard to your testimony as an expert witness in
21 this case. Do you recall that?

22 A. I do.

23 Q. And that affidavit is dated February 1st of 2013. Does that
24 sound consistent with your recollection?

25 A. I believe so.

1 Q. And do you recall -- if you need me to have you show it
2 perhaps Mr. Machulak has it, but this is Document Number 14 in
3 this case and I'm focusing on Page 14 at Paragraph 40 of this
4 document.

5 MR. MACHULAK: Do [Indiscernible].

6 MR. SMOKOWICZ: Your Honor, let me just see if the
7 witness needs this.

8 BY MR. SMOKOWICZ:

9 Q. The last sentence in that paragraph reads, quote:

10 "Measuring reputation and goodwill by this standard,
11 Tri-Corp's loss of goodwill easily amounts to \$300,000 per year,
12 and there is no doubt in my mind that Tri-Corp would be in
13 existence today and for many years to come but for Mr. Bauman's
14 conduct," close quote.

15 Do you recall swearing to that statement, Mr. Breuer?

16 A. I do.

17 Q. Now, Mr. Breuer, I've also got an affidavit from you from
18 March 20th of 2009, that was part of you're initial submission
19 to this court on the motion. That's Document 12-1 is your
20 affidavit, and Page 5 of 111 of that.

21 And I know I'm skipping around so I'd ask the Court to
22 let me know when it's ready, and Mr. Machulak as well.

23 THE COURT: Which page?

24 MR. SMOKOWICZ: Well, by my copy it's Page 5 of 111.

25 THE COURT: That's the last page.

1 MR. SMOKOWICZ: And Document 12-1.

2 THE COURT: I have it.

3 MR. SMOKOWICZ: And it's Mr. Breuer's -- it's the
4 signature page from Mr. Breuer's March 20th, 2009 affidavit.

5 BY MR. SMOKOWICZ:

6 Q. Do you remember this affidavit, Mr. Breuer, executing it in
7 state court?

8 A. It was years ago, but yes.

9 Q. And I'm going to read the last sentence of that affidavit.
10 Quote: "Based on this documentation it is my opinion" -- or
11 excuse me -- "in my opinion the damage to Tri-Corp's reputation
12 is not less than \$10 million," close quote.

13 Do you recall swearing to that statement, Mr. Breuer?

14 A. I do.

15 Q. So we've got three figures here today, correct? \$6 million,
16 \$10 million, and \$300,000 a year from 2007, which by my math
17 works out to something around the order of \$1.8 million. Is
18 that correct?

19 MR. MACHULAK: Object as argumentative.

20 [Indiscernible] in the affidavit.

21 THE COURT: The last statement does appear to be
22 unsupported. Do you wish to rephrase?

23 BY MR. SMOKOWICZ:

24 Q. Well, we've got at least two, 6 million versus 10 million,
25 correct?

1 A. I believe so.

2 Q. And the third one you had in your affidavit that you
3 submitted to this court which was loss of goodwill in the amount
4 of \$300,000 per year, right?

5 A. Yes.

6 Q. And, of course, that's measured from the time the mortgage
7 was foreclosed, correct?

8 A. Actually the impact to Tri-Corp preceded that. There were
9 many actions on the part of the alderman that led to the
10 mortgage foreclosure, and that's when the losses commenced.

11 Q. Well, Mr. Brever, I apologize for not being able to intuit
12 that since your affidavit doesn't include a starting date.

13 THE COURT: Ask the -- ask the question, please.

14 MR. SMOKOWICZ: I apologize and I will ask it this
15 way.

16 BY MR. SMOKOWICZ:

17 Q. Your affidavit here talks about \$300,000 per year, what year
18 does that begin?

19 A. It was based on the grant revenue to create housing, which
20 actually was a program area of the organization, at least two
21 years before the foreclosure. And, based on my experience,
22 grant revenue of up to a million dollars to create housing earns
23 development fees and those development fees are potentially on a
24 million dollar grant, upwards of \$300,000 a year.

25 Q. So, Mr. Brever, if I understood your answer correct, the

1 beginning year is 2005?

2 A. The impact on the organization was 2005.

3 Q. So this is 2013, correct?

4 A. Yes.

5 Q. And that's eight years, correct?

6 A. Yes.

7 Q. So if my math works out correctly, that's eight times
8 300,000 which is \$2.4 million, correct?

9 A. Yes.

10 Q. So we have three different figures here, 2.4, 10 million,
11 and 6 million, correct?

12 MR. MACHULAK: Well, I'll object again to the form of
13 the question.

14 THE COURT: Overruled.

15 THE WITNESS: Yes.

16 BY MR. SMOKOWICZ:

17 Q. Mr. Brever, lastly, you mentioned that -- in your earlier
18 testimony that you had been involved in numerous sales
19 transactions, correct?

20 A. Yes.

21 Q. And that was for properties that Tri-Corp owned, correct?

22 A. Yes.

23 Q. Most if not almost all of those properties --

24 A. Could I clarify that last one? We were also managing
25 properties on behalf of a pure organization and I facilitated

1 sales on behalf of West Side Housing Cooperative as well.

2 Q. I appreciate the clarification.

3 A. Thank you.

4 Q. Most of those properties were single- or maybe perhaps two-
5 or three-family units, correct?

6 A. Most of them were that, yes. There were some multi-family's
7 involved as well.

8 Q. So basically we're talking about residential homes, duplexes
9 and an occasional apartment type building, correct?

10 A. Yes. Correct.

11 Q. All right. And in this particular situation we are talking
12 about West Samaria which had -- which was a rooming house type
13 building, correct?

14 A. It was.

15 Q. And it had -- how many was it?

16 A. 93.

17 Q. 92. 92?

18 A. 92. Yes.

19 Q. 92. Units.

20 Thank you, Your Honor. That's all I have.

21 THE COURT: Any redirect?

22 MR. MACHULAK: I do, Your Honor.

23 THE COURT: Just so that you know I have another
24 hearing starting at 11:00 o'clock.

25 MR. MACHULAK: Okay.

REDIRECT EXAMINATION

BY MR. MACHULAK:

Q. Mr. Brever, showing you --

THE COURT: You have to speak in the mic.

THE WITNESS: Should I just go get the paper?

THE COURT: He can hand you the paper and then ask the question after he gets back in front of a mic.

BY MR. MACHULAK:

Q. Mr. Brever, I am showing you your affidavit that Mr. Smokowicz has just asked you about which is Document Number 14. And I want to direct your attention to Paragraph 40.

In Paragraph 40 is where -- well, where does the \$300,000 figure come from, the annual \$300,000 figure?

A. It's my experience based on development fees that can be earned by a nonprofit through the work that's generated by grant revenue. Typically when we would acquire and renovate properties we would expend up to 145 percent of the value of the property in renovation. That would generate development fees and, as a result of that, that's what this figure is based on. We had anticipated \$300,000 for each million dollars that we received in grants and awards and that's how we did our budgeting at that time.

Q. And did that figure work out for you?

A. It did.

Q. And when you and Mr. Smokowicz asked you to compare that

1 figure to \$6 million, a figure that you gave on the stand, how
2 does that compare?

3 A. It would have been -- again, I mean, I don't testify in
4 court on a daily basis and I certainly don't testify in federal
5 court on a daily basis. I misspoke in stating that the
6 6 million was our annual budget so that was the goodwill. In
7 reality when I initially analyzed this I measured our goodwill
8 based on development fees and I should have said that.

9 Q. Okay. So in the -- if you take 300,000 a year is it fair to
10 say it takes a multiple about that, of that to get an overall
11 loss of goodwill?

12 A. I do. It's based on the number of years since the
13 circumstances here, and also an anticipated growth in potential
14 revenue as well.

15 Q. Okay. And Mr. Smokowicz asked you some questions about --
16 let me ask you before we leave there, is there any better way to
17 measure goodwill for the organization?

18 MR. SMOKOWICZ: I object to the form of the question.
19 It calls for speculation.

20 THE COURT: Sustained.

21 BY MR. MACHULAK:

22 Q. When you -- going back to some of the earlier questions.
23 You were asked a question of whether or not you were an
24 accountant. Were you familiar with accounting from your
25 day-to-day involvement with Tri-Corp?

1 A. I was involved with the accounting on a day-to-day basis,
2 yes.

3 Q. And regardless of whether or not you're an accountant did
4 the Tri-Corp generate financial information on a month-to-month
5 basis that you relied upon?

6 A. Yes.

7 Q. Did you have any difficulty at all understanding and
8 assessing what that financial information meant?

9 A. I did not.

10 Q. And does that financial information, in fact, support the
11 figures that you've entertained -- that you've put into your
12 affidavit?

13 A. I believe it does.

14 Q. In terms of looking at -- you were asked some questions
15 about the 2008 tax assessment for the West Allis property New
16 Samaria. The tax assessment for the 2008 was \$1,171,900,
17 correct?

18 A. I believe that's correct.

19 Q. And how many units did West Samaria have versus New Samaria?

20 A. It's a different type answer than you might have for West
21 Samaria because New Samaria housed 75 residents. Some of the
22 units were dual occupancy, but it housed 75 residents and West
23 Samaria housed 92 in single-room occupancy.

24 Q. Okay. So in West Samaria how many of the residents occupied
25 double-occupancy rooms?

1 A. None, in West Samaria.

2 Q. And in New Samaria how many occupied dual?

3 A. I believe 66 lived in dual occupancy.

4 Q. So in your view does the assessment for New Samaria indicate
5 a value for New Samaria -- for West Samaria?

6 MR. SMOKOWICZ: Objection, beyond the competence of
7 this witness to testify. Calls for speculation, based on
8 assessment.

9 THE COURT: Repeat your question?

10 BY MR. MACHULAK:

11 Q. Does the value that you've -- see for the West Samaria --
12 for the New Samaria property indicate some value for the New
13 Samaria property?

14 MR. SMOKOWICZ: I'm going to object to the form of the
15 question. Calls for --

16 THE COURT: Sustained. Form of question.

17 BY MR. MACHULAK:

18 Q. If you were going to make an analysis on the property tax
19 data for New Samaria, how many units would you break into -- how
20 many units would you divide the million one apart?

21 MR. SMOKOWICZ: I'm going to object to the form of the
22 question. It's confusing. Also calls for speculation here
23 based upon someone else's work, the assessor's work.

24 THE COURT: Sustained. Moreover, he's already
25 provided a value.

1 MR. MACHULAK: Okay.

2 BY MR. MACHULAK:

3 Q. Would you use your value in using the other method for New
4 Samaria how many units did you assume were in New Samaria?

5 A. Again, the primary method was the number of residents that
6 lived within the facility because the service model is as equal
7 to the valuation of the campus as it is the individual units.
8 So I broke it out by residents that lived in the facility.

9 Given the fact that there were 75 meals given three
10 times a day, there was staffing on an entire campus. It's not
11 just a number of units, it's the number of people living there.

12 Q. Okay. So the number of people there you're --

13 A. 75.

14 Q. Okay. That's all.

15 THE COURT: You may step down.

16 THE WITNESS: Thank you.

17 THE COURT: The Court is going to sustain the defense
18 objection to Mr. Brever offering opinion testimony in this case.
19 There are multiple reasons for this decision.

20 First, to the extent that the plaintiff is attempting
21 to offer Mr. Brever as a witness -- as a lay witness, the
22 plaintiff needs to demonstrate that Mr. Brever's testimony is
23 based upon information that he has observed personally.

24 To that -- in that regard the Court notes that one of
25 the key factors in Mr. Brever's valuation is his reliance upon a

1 newspaper article. Mr. Breuer has not researched the data
2 underlying that newspaper article.

3 Number 2. Mr. Breuer has not offered through his
4 affidavit or through his testimony the particulars with regard
5 to his work with the numbers at Tri-Corp. He has talked about
6 what occurred when Tri-Corp was acquiring property back in 2001.
7 He has talked about dealings with WHEDA. He has talked about
8 housing units. But he has not given particulars regarding what
9 he knows and what he put together with respect to the financing
10 of Tri-Corp and/or West Samaria.

11 The Court further notes that Mr. Breuer did not
12 prepare information based upon what was going on in the
13 neighborhood or with comparable housing for disabled persons
14 within the city of Milwaukee or the Milwaukee metropolitan area.
15 He has not placed -- in fact, what he has done in several
16 instances is he has taken information regarding the newest
17 property and then superimposed that on the other property.

18 The West Allis facility was acquired earlier and it
19 appears from what I've heard that the Milwaukee facility on
20 State Street is very different than the other facility. The
21 State Street property does not have a lot of area surrounding
22 it, whereas the West Allis facility has a lot of -- has real
23 estate surrounding it.

24 The Court notes also that with respect to reputation
25 Mr. Breuer has given three different figures regarding how he

1 would value the reputation or goodwill of the -- of the entity,
2 and those figures are just inconsistent. An expert, whether he
3 is a lay expert or a business expert or a person who has been
4 tendered as an expert, needs to provide objective data upon
5 which his or her opinion rests. Much of what the Court has
6 heard here is just speculation and it does not take into account
7 things such as costs.

8 Mr. Breuer, for example, just testified that
9 development, when you get a grant of about a million dollars you
10 would anticipate \$300,000 in development revenue. Well, the
11 mere fact that you have revenue doesn't mean that you are going
12 to have any net income. You may have gross income, but it's not
13 net income. And if your gross income is going to be eaten up by
14 costs, at the end of the day you have nothing.

15 And in this particular instance, as Mr. Smokowicz has
16 pointed out, Tri-Corp was a losing proposition generally over
17 the life that, as was testified to, in most years there was a
18 loss. In 2005 there was a loss of \$63,113.70, however, in 2006
19 there was a profit of \$41,527.91; in 2007, a loss of
20 \$140,783.52, and in 2008 a profit of \$18,043.86, for a net loss
21 of \$144,325.45.

22 So the entity was not for its life a profit-making
23 venture. When I say "profit" I'm acknowledging the fact that
24 this is a nonprofit entity and the way it was set up revenues
25 were not to exceed I think you said 15 percent -- I should say

1 you shouldn't have additional monies after your operating
2 expenses of more than 15 percent.

3 The Court has tried to lean over backwards in
4 assessing what Mr. Brever had to say. And it acknowledges that
5 an officer of an entity may, under certain circumstances, offer
6 an opinion as to value. However, in this particular instance
7 the plaintiff has not provided all of the details that are
8 essential to allowing Mr. Brever as an executive director or
9 officer of Tri-Corp to testify with respect to value.

10 The Court further notes that the Milwaukee entity was
11 not one that was on the tax rolls, and it certainly makes it
12 difficult for the executive director to testify with respect to
13 value.

14 The Court does note, however, that the West Allis
15 facility was assessed. But the assessment is not something that
16 was done by Mr. Brever. It was something that was done by the
17 city using a formula. And it has not been shown that the
18 formula that was used in West Allis is the same formula that's
19 used in the city of Milwaukee, or in other entities.

20 Therefore, Mr. Brever can't testify to the value of
21 the Milwaukee facility utilizing the West Allis numbers in terms
22 of the demand for the Milwaukee facility. He has not testified
23 to the demand. He has not testified to whether or not there was
24 an ongoing demand for the Milwaukee facility. He has not
25 testified to any data that provides a basis for his reputation

1 testimony.

2 For example, Mr. Breuer did not testify to having
3 spoken with any experts in the area. He has not testified to
4 talking with anyone in the community generally regarding the
5 reputation of Tri-Corp. The essence of his testimony is: on
6 some occasions in the past Tri-Corp was asked to assist WHEDA in
7 running other entities, and essentially that's all that we have
8 with regard to reputation testimony.

9 Any change in the reputation of Tri-Corp was ignored.
10 And there is just not enough data in the record, and
11 particularly in the affidavits that have been offered by
12 Tri-Corp, to support Mr. Breuer's testimony.

13 Under some circumstances perhaps the plaintiff could
14 have demonstrated more, but in this particular instance
15 sufficient information is not in the record and, therefore, the
16 Court will not permit Mr. Breuer to offer his opinion testimony
17 during any trial of this matter, should we get past the pending
18 motion for summary judgment.

19 That does not mean that Mr. Breuer cannot testify to
20 objective facts. He certainly is entitled to testify to
21 objective facts. But his opinion with respect to valuation is
22 being rejected.

23 Is there anything further at this time?

24 MR. MACHULAK: Your Honor, by way of clarification on
25 the objective facts, part of his testimony was the

1 month-to-month dollar loss sustained which is -- by the
2 organization as the facility became empty, was forced empty.
3 Are those objective facts --

4 THE COURT: He can testify to data that is -- that he
5 is personally aware of. And I'm trying to point that out: data
6 that he was personally aware of. And so to the extent that
7 there may be something beyond that data that he concludes that
8 is certainly subject to objection, I don't know what information
9 Mr. Brever has with respect to individual sums or particular
10 sums that he would come up with as losses. If that's something
11 that he concluded and he has an objective basis for coming to
12 that conclusion, he's certainly qualified -- he would certainly
13 be permitted to testify to that. But it's unclear exactly what
14 he knew and when he knew it.

15 Is there anything else at this time?

16 MR. SMOKOWICZ: Not from the defendant, Your Honor.

17 THE COURT: Very well. We stand in recess.

18 Oh, the Court will continue to proceed on the motion
19 for summary judgment unless the parties wish to evaluate -- wish
20 to reevaluate their positions respecting the same. Are you able
21 to make any decision in that regard at this time?

22 MR. SMOKOWICZ: Not in the courtroom, Your Honor, but
23 obviously we will look into that as well.

24 THE COURT: Mr. Machulak?

25 MR. MACHULAK: Same answer, Your Honor, I guess.

1 THE COURT: All right.

2 MR. SMOKOWICZ: Thank you very much, Your Honor.

3 THE COURT: All right. We're in recess.

4 THE BAILIFF: All rise.

5 (Audio file concluded at 11:10:41 a.m.)

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C E R T I F I C A T E

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter and Transcriptionist for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

Signed and Certified March 4, 2014.

/s/John T. Schindhelm

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